86-780

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

BRONSON C. LA FOLLETTE,
ATTORNEY GENERAL OF WISCONSIN,

Petitioner,

v.

BURLINGTON NORTHERN
RAILROAD COMPANY and
BURLINGTON NORTHERN DOCK CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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QUESTION PRESENTED

Does a state tax statute which on its face arguably favors local business at the expense of interstate commerce violate the Commerce Clause if in fact the tax has no discriminatory effect whatsoever?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Bronson C. La Follette, Attorney General of Wisconsin, the respondents, Burlington Northern Railroad Company and Burlington Northern Dock Corporation (together hereinafter referred to as "Burlington Northern") and the City of Superior, Wisconsin.[1]

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[1]The lower court caption includes Burlington Northern, Inc., the prior name of the present Burlington Northern Railroad Company. The lower court caption does not include the Wisconsin Attorney General, who was not named in Burlington Northern's pleadings, but who entered the case as a matter of right under state law because the constitutionality of a state statute was at issue. The City of Superior, which collected the tax which is the subject of this litigation, was the only named defendant below.

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

CASES CITED

OPINIONS AND OTHER LOWER COURT PAPERS

The opinion of the Wisconsin Supreme Court is reported at 131 Wis. 2d 564, 388 N.W.2d 916 (1986), and is reprinted in the appendix hereto at 101.

The order of the Wisconsin Supreme Court denying the Attorney General's motion for reconsideration is unreported. It is reprinted in the appendix at 155.

The opinion of the Court of Appeals of Wisconsin, certifying the case to the Wisconsin Supreme Court, is unreported. It is reprinted in the appendix at 159.

The Memorandum Decision, Findings of Fact, Conclusions of Law and Final Judgment of the Circuit Court of Douglas County, Wisconsin (the trial court), are unreported. They are reprinted in the appendix at 164 - 202, except for

the parties' stipulation of facts and exhibits thereto, incorporated by reference by the trial court as its findings.

STATEMENT OF JURISDICTION

The Wisconsin Supreme Court rendered its decision reversing the judgment of the state circuit court and invalidating Wis. Stat. § 70.40 (1983-84), on the sole ground that the statute violated United States Constitution art. I, § 8, cl. 2, the Commerce Clause, on June 25, 1986. The court denied the Attorney General's timely motion for reconsideration by order dated August 15, 1986. This court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Const. art. I, § 8, cl. 2

> The congress shall have the power . . . .
>
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

Wis. Stat. § 70.40 (1983-84)

(Text set forth in the appendix hereto at 108.)

1985 Wisconsin Act 29, §§ 1216b and 1216d, amending Wis. Stat. § 70.40 (1983-84).

(Text set forth in the appendix at 205.)

STATEMENT OF THE CASE

Burlington Northern operates dock facilities on Lake Superior in the City of Superior, Wisconsin. Burlington Northern trains haul taconite pellets to the dock facilities from Minnesota, where the raw material is mined and processed. The taconite pellets are

stored at the docks until they can be loaded onto barges for shipment to Canada and to Great Lakes ports outside of Wisconsin.

Wisconsin imposes an occupational tax on the operation of iron ore concentrates (which includes taconite) docks. Wis. Stat. § 70.40 (1983-84). The tax is measured by the volume of material handled.

Until recently, the statute exempted from the quantity of material used to measure the tax, any iron ore concentrates subject to Wisconsin's occupational tax (Wis. Stat. §§ 70.37-70.395) on the mining in Wisconsin of metallic minerals. The statute also contained other exemptions not relevant to this petition.

During the period in question (May 1, 1977 through December 31, 1980),

Burlington Northern paid, under protest, a total of close to $2 million in dock taxes to the City of Superior which, pursuant to the statute, retained 70% and forwarded the remainder to the state, which allocated 10% to its general fund and the remaining 20% to a trust fund for grants to alleviate the adverse effects of metalliferous mining.

Burlington Northern passed along the taxes it paid as the operator of the docks to its customers, which are steel companies in states other than Wisconsin.

Burlington Northern sued for a tax refund.[2] The trial court, on stipulated

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[2]Burlington Northern raised several grounds not relevant to this petition. In addition to claiming that the dock tax discriminated against interstate commerce, Burlington Northern claimed that the tax violated the other prongs of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and violated the import-export clause.

facts, concluded that the statute discriminated against interstate commerce but severed the offending exemption and upheld the tax. The state intermediate appellate court certified Burlington Northern's appeal to the Wisconsin Supreme Court.

The Wisconsin Supreme Court held that the effect of the dock tax was to discriminate against out-of-state taconite producers, which indirectly paid the tax on the shipment by Burlington Northern of their taconite, in favor of their "W'sconsin counterparts" in violation of the commerce clause. Burlington Northern v. Superior, 131 Wis. 2d 564, 576, 388 N.W.2d 916 (1986) (Appendix hereto at 101).

The court also held that the purpose of the exclusion from the measure of the tax of Wisconsin mined ore, which is subject to the separate metallic minerals mining tax, was to favor Wisconsin producers. The court declined to sever the exemption and struck down the tax.

During the years in question, Burlington Northern was the only iron ore concentrates dock subject to the Wisconsin tax, and only one mining company was subject to Wisconsin's metallic mineral mining tax. That company was wholly owned by one of Burlington Northern's customers. None of its ore was shipped over Burlington Northern's docks.

The objectionable exemption was repealed by the Wisconsin Legislature while the appeal was pending.

The Attorney General asked the Wisconsin Supreme Court to reconsider its decision on two grounds: (1) that the court misconstrued the uncontested material facts which establish that during the entire life of the exemption for Wisconsin-mined ore, no person or company was benefited because the only taconite produced in Wisconsin was mined by a subsidiary of one of Burlington Northern's customers and shipped by rail, not by barge over Burlington Northern's docks; and (2) because the court erred in interpreting this Court's decisions as requiring the invalidation of state taxes, the purpose of which may arguably be to favor local over out-of-state business, irrespective of the taxes' actual effect upon commerce. The court denied reconsideration without discussion.

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN SUPREME COURT'S DECISION IS A THROWBACK TO AN ERA DURING WHICH ECONOMIC REALITIES WERE IGNORED IN FAVOR OF FORMALISM.

Since Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), this Court has rejected Commerce Clause decisions which bore "no relationship to economic realities." Id. at 279. In the present case the Wisconsin Supreme Court ignored the stipulated facts which established that any discrimination against interstate commerce was theoretical; that in fact no local business was favored in any manner during the entire period of time in which the challenged statutory exemption existed.

This is an era of disappearing state reliance upon federal financial assistance. Witness the elimination of revenue sharing and the restraints

imposed by the federal deficit. State legislatures must make the tough taxing and spending decisions necessary to finance legitimate state and local activities.

A prime economic attraction of the City of Superior is its port facilities on the largest of our Great Lakes. Users of this valuable natural resource are asked to pay their fair share of the costs occasioned by massive port facilities, such as Burlington Northern's $70,000,000 facility, through the payment of occupational taxes. By this reasonable financing device, the state has provided for needed local revenue at the local level, revenue related to local activities, and without state or federal assistance. It is ironic that the federal constitution should be the basis for invalidating such a plan, when it is

uncontested that in actual economic effect the tax discriminates against nobody.

Financing schemes such as this one should be encouraged. This Court can do so by rejecting erroneous applications of the Commerce Clause such as the decision of the Wisconsin court in this case.

II. THE WISCONSIN SUPREME COURT'S DECISION OVERLOOKED AND MISCONSTRUED SIGNIFICANT AND CONTROLLING FACTS APPEARING IN THE RECORD IN DECIDING THAT THE STATUTE WAS DISCRIMINATORY IN EFFECT.

The court decided that Wis. Stat. § 70.40 discriminated against out-of-state mining companies in favor of Wisconsin mining companies. More specifically, the court found that the exclusion of Wisconsin-mined ore from the measure of the occupational tax imposed by the statute has a discriminatory effect on

interstate commerce; that the effect is to enhance or encourage Wisconsin's mining industry; that Wisconsin taconite is more attractive to mine than out-of-state ore; and that out-of-state taconite is more expensive than Wisconsin taconite.

Not only are none of these findings of fact supported by the record, the opposite are conclusively established.[3]

All that the record revealed about a Wisconsin taconite industry is that one company -- the Jackson County Mining Company -- mined and produced taconite

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[3]The trial court, which agreed that the statute was unconstitutional because of the exclusion for Wisconsin taconite, did not make the findings of fact the supreme court made. The lower court adopted the parties' stipulation, which contained no such facts. In its decision, the trial court stated an additional finding: that "the exemption [for Wisconsin-mined ore] has never been used . . . ."

during the taxable periods in question; that it paid $9,653 in mining taxes during that period; that none of its taconite was handled by Burlington Northern over the Superior docks; and that it closed down in 1983, leaving no operating taconite mines in Wisconsin.

No court could reasonably conclude based on these facts that Wisconsin's mining industry, such as it was, was affected at all by the statute, let alone encouraged and enhanced by it. We do not know when the Jackson County Mining Company started mining; why it mined where it did; why it shipped its product by rail rather than by barge;[4] where it

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[4]If it is fair to deduce anything about this subject, it is reasonable to assume that the Jackson County Mining Company mined in Jackson County, located in the center at the state, nowhere near a Great Lakes port, and that it would have made no sense to ship its ore to Superior for transport out-of-state.

shipped to; what its cost of shipment was; or what the cost of its products was. All we know is that it paid less taxes to Wisconsin than Minnesota mining companies paid. But this fact has nothing to do with the statute.

Had the exemption for Wisconsin taconite never existed, the Jackson County Mining Company would have paid exactly the same amount of taxes, because the ore was shipped by rail, not barge, and therefore never benefited from the dock tax exemption. Similarly, had the exemption never existed, Minnesota mining companies (to whom Burlington Northern passed along the dock tax) would still have paid the same amounts they did pay. The statute's exemption had no effect upon Wisconsin mining operations

relative to out-of-state mining operations.

Theoretically, the statute could have had an effect. If Jackson County had used the Burlington Northern docks, it would not have paid a dock tax because of the statutory exclusion of Wisconsin-mined ore. But theoretical favors do not amount to discrimination. All existing precedent support this proposition.

As early as 1940, this Court stated:

> The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses . . . .

Best & Co. v. Maxwell, 311 U.S. 454, 457 (1940) (emphasis added). The analysis was stated in Maryland v. Louisiana, 451 U.S. 725, 757 (1981) this way:

> A state tax must be assessed in light of its actual

> effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'

(Emphasis added.) Complete Auto, 430 U.S. 274, resoundingly rejected prior court decisions which bore "no relationship to economic realities." Id. at 279. The Court observed the trend "toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." Id. at 282.

> There is no economic consequence that follows necessarily from the use of . . . particular words . . . and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.

Id. at 289 (emphasis added). In Dept. of Rev., etc. v. Ass'n of Wash. Steve. Co.,

435 U.S. 734 (1978), which considered port operations virtually identical to those of Burlington Northern in Superior, the Court reiterated that the focus is upon the practical effect of a challenged tax statute and concluded that the taxpayer there had failed to prove its case as a matter of fact:

> Respondents proved no facts in the Superior Court that, under the above test, would justify invalidation of the Washington tax. The record contains nothing that minimizes the obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevdoring operations within the State. Nor have respondents successfully attacked the apportionment of the Washington system. The tax under challenge was levied solely on the value of the loading and unloading that occurred in Washington. Although the rate of taxation varies with the type of business activity, respondents have not demonstrated how the 1% rate, which applies to them and generally to business rendering services, discriminates against interstate

> commerce. Finally, nothing in the record suggests that the tax is not fairly related to services and protection provided by the State. In short, because respondents relied below on the per se approach of Puget Sound and Carter & Weekes, they developed no factual basis on which to declare the Washington tax unconstitutional as applied to their members and their stevedoring activities.

Id. at 751-52 (emphasis added).

The simple point is that Burlington Northern, like the Washington stevedores, has no case in fact. The exemption had no effect on the cost of mining taconite in Wisconsin because it was never applied to taconite mined in Wisconsin.

As of 1985, the exemption was removed from the statute. Thus, prospectively, there can never be discrimination because Wisconsin-mined ore, if ever there is any, will be treated exactly like out-of-state ore insofar as the dock tax is concerned.

For this reason, the Court can only conclude that the statute will never have the effect of discrimination.

Finally, even if the statute had in fact affected the Jackson County Mining Company, by lowering its costs relative to the costs of Minnesota mining companies, there still would have been no discrimination in effect. The parties stipulated that the Jackson County Mining Company was owned outright by the same corporation which owned one of the Minnesota mining companies. In other words, the only possible beneficiary of the exemption was owned by the same corporation which the lower courts had found to be a victim of the exemption.

In finding discrimination in fact in this case, the Wisconsin Supreme Court overlooked and misconstrued the record,

to the advantage of Burlington Northern, which was never discriminated against because no one was ever favored. The decision bears "no relationship to economic realities," Complete Auto, 430 U.S. at 279, and should not stand.

III. THE WISCONSIN SUPREME COURT OVERLOOKED CONTROLLING LEGAL PRECEDENT IN CONCLUDING THAT DISCRIMINATORY PURPOSE WILL INVALIDATE A STATUTE IRRESPECTIVE OF THE STATUTE'S EFFECT.

The court not only ruled that Wis. Stat. § 70.40 discriminated in effect; it ruled that the statute was discriminatory "on the basis of [its] . . . purpose . . . ." This amounts to holding that the statute is unconstitutional on its face, regardless of its effect. This is contrary to recent decisions of this court.

The Wisconsin court cited Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104

S. Ct. 3049 (1984) for the proposition. The citation was correct, but out of context.

In Bacchus, the state asked the Court to take a "flexible approach" and balance the "relative burden" on interstate commerce with the state's economic objectives. The Court refused to proceed in this fashion because of the statute's discriminatory purpose (to promote a fledgling wine industry). Id. at 3055. But the Court was not saying that discriminatory purpose necessarily dooms a statute. Discriminatory purpose just renders unavailable any balancing of the statute's effect with the state's objectives. Effect is still relevant. The facts of Bacchus demonstrate this. The state did not contend, as we contend here, that the statute did not in fact burden interstate commerce at all; it

contended a relatively minimal effect. The Court refused to weigh the extent of the burden but it assumed some burden, and expressly looked for, and found, discriminatory effect. Id. at 3056.

In all other cases we have been able to find, purpose alone did not doom a statute. In Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333 (1977), cited in Bacchus, the Court found discrimination in effect. In City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), the Court stated the rule as follows: "[W]here simple economic protectionism is effected . . . a virtually per se rule of invalidity has been erected." Id. at 625. Discrimination in fact was assumed. Id. at 626.

In Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 104 S. Ct. 1856 (1984), the Court found that the purpose

of the statute in question was to favor local industry at the expense of other states but went on to discuss the "discriminatory economic effect" of the statute and to reject "formalistic distinctions that lack economic substance." Like Hawaii in Bacchus, New York in Tully argued that the burden on interstate commerce was "slight." The Court refused to weigh and balance but still insisted upon proof of some burden in fact. Id. at 1867.

In Armco v. Hardesty, 467 U.S. 638, 104 S. Ct. 2620 (1984), the Court, while not requiring the challenging taxpayer to point to taxes in other states resulting in a total higher burden than its competitors, did not do so because it found an "obvious burden." Id. at 2624.

In Williams v. Vermont, __ U.S. ___, 105 S. Ct. 2465 (1985), the Court held that a Vermont statute creating a tax

credit for residents was on its face "an arbitrary distinction that violates the Equal Protection Clause." Id. at 2471. Yet, the Court explicitly noted that it was not deciding that under no circumstances could the statute be enforced:

> In addition, we note that this action was dismissed for failure to state a claim before an answer was filed. The "dominant theme running through all state taxation cases" is the "concern with the actuality of operation." Halliburton, 373 U.S., at 69, 83 S.Ct., at 1203. It is conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion.

Id. at 2474 (emphasis added).[5]

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[5]The citation to Halliburton, a Commerce Clause case, makes it clear that the rule of Williams is not limited to Equal Protection Clause claims.

In our case, a full record was developed, and it does turn out that in practice the statute did not discriminate. According to Williams, that the statute on its face may have permitted discrimination is of no consequence.[6]

Most recently, in Brown-Forman Distillers v. N.Y. State Liquor Auth., ____ U.S. ____, 106 S. Ct. 2080 (1986), the court reaffirmed that "the critical consideration [in commerce clause challenges] is the overall effect of the statute on both local and interstate activity." Id. at 2084.

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[6]The dissent in Williams would have upheld the tax as a matter of law, finding only "phantom beneficiar[ies] of Vermont's discrimination." Id. at 2476. The dissent agreed with the majority that if a "hypothetical Vermonter is not entitled to the [credit], the discrimination disappears." Id. at 2476.

To ask the Court to insist upon proof of discrimination in fact is not to insist that the validity of the statute be held to depend "upon the vicissitudes of business decisions," as Burlington Northern has argued. We have a fixed system here. The statute did not discriminate in the past and, because the exemption has been repealed, cannot discriminate in the future. On the basis of a "phantom beneficiary," Burlington Northern, as the defender of the rights of Minnesota mining companies, will reap a windfall refund, notwithstanding the total absence of any practical economic consequences as a result of treatment of Wisconsin-mined ore.

CONCLUSION

For the above-argued reasons, we respectfully ask the Court to review and reverse the decision of the Wisconsin Supreme Court.

Dated: November 5, 1986.

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